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No. 80-2209

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In our opening brief we set forth two independent grounds for sustaining the search of respondent's paper bag, lawfully seized from the trunk of his car based upon probable cause to believe that it contained heroin. First, we argue (Br. 14-41) that procurement of a warrant is not a precondition to a reasonable search when police have lawfully seized a container that is not conventionally associated with substantial privacy interests and possess probable cause to believe that it contains contraband or evidence of a crime. Second, we contend that, whatever the rule may be in other settings, application of the warrant requirement to a search of a container found during a probable cause search of an automobile is unjustified. Neither respondent nor amicus curiae American Civil Liberties Union (ACLU) has come to grips with the fundamental principles of Fourth Amendment jurisprudence that underlie each of our arguments. We accordingly note only a few salient points in reply.

1. In response to our attempt to examine the issue on the basis of the policies underlying this Court's decisions regarding the applicability of a warrant requirement to various types of searches, respondent and amicus ACLU simply assert that "warrantless searches are *per se* unreasonable" (Resp. Br. 23; see ACLU Br. 14-15). Amicus ACLU urges that our argument, which looks toward the nature of the privacy interest at stake and the benefits to be derived from insistence upon the warrant procedure, would create an exception to a warrant requirement finding "no support in either the language of the Fourth Amendment or any interpretation of that Amendment made by this Court" (Br. 38). These contentions stand the matter upon its head. As noted in our opening brief (at 14-15 n.6), the bare language of the Fourth Amendment imposes no requirement of recourse to warrants whatsoever. This Court, to be sure, has held that in order to meet the test of reasonableness laid down by the Fourth Amendment, "normally searches of private property [must] be performed pursuant to a search warrant * * *." *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979). But the Court has been equally firm pointing out that exceptions are fashioned to this general presumption where "the societal costs of obtaining a warrant * * * outweigh the reasons for prior recourse to a neutral magistrate." *Id.* at 759.

We have accordingly attempted to argue the issue in terms of whether the benefits of applying a warrant requirement to probable cause searches of containers having relatively low privacy attributes are in general likely to outweigh the social and individual costs of such a requirement. Thus, we have carefully analyzed the benefits generally derived from warrants, and shown that they are greatly attenuated in the context of a search of a seized container such as respondent's paper bag (Br. 21-24, 29, 43). At the same time, we have contended (Br. 25-28, 43-46) that the

imposition of a warrant requirement has substantial costs that, while well justified in other contexts, outweigh the benefits in this context; in this connection, we have noted the special costs to other Fourth Amendment interests of the container's owner flowing from a warrant requirement for container searches (Br. 25-28).

Neither respondent nor amicus has elected to join issue with us on a functional analysis of the costs and benefits of a warrant requirement for this type of case. Respondent simply does not address the question whether a warrant requirement serves its usual purpose in this setting. The ACLU is similarly silent as to the applicability of most of the justifications usually cited in support of the warrant requirement, dismissing our contentions as irrelevant "policy considerations" (Br. 46 n.38). But it is the policy of the Fourth Amendment itself that is at issue here.[1]

2. In our second argument we note (Br. 42-43) that because the policy of the Fourth Amendment does not require a warrant when a vehicle is searched upon probable cause pertaining to the vehicle, there is no justification for limiting the search more strictly than if it were conducted pursuant to a warrant authorizing a search of the vehicle. Perhaps in recognition of the odd result fostered by the decision of the court of appeals, respondent's answer to our contention is the suggestion (Br. 6-7, 13-21) that the

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[1]The amicus curiae does insist that even in the setting of this case, a warrant serves to establish "the particularity of the search to be conducted" (Br. 30), adding "[t]here is no more justification to permit wholly unparticularized and general searches of automobile trunks than of any other area" (*ibid.*). This argument is misconceived, for at the point at which a warrant to search respondent's bag could have been sought, a "general" search of the automobile trunk had already been lawfully completed and the focus of interest had narrowed to the bag. Unless *Carroll* v. *United States*, 267 U.S. 132 (1925), is to be overruled, a warrant requirement simply does not serve to confine the search in the manner suggested.

Court overrule *Chambers* v. *Maroney*, 399 U.S. 42 (1970), and limit the automobile search exception to exigent circumstances created by the mobility of an unsecured automobile on the highway. We do not essay here to defend the automobile search doctrine repeatedly endorsed by the Court.[2] We do observe, however, that respondent's proposed modification of the automobile search rule would not aid him, for the search of his bag was completed while his car was parked on a public street rather than while the car was in secure police custody, as was the case in *Chambers*. Thus, unless one assumes that the act of seizing a vehicle itself eliminates the basis for a search—a proposition analogous to that rejected in *New York* v. *Belton*, No. 80-328 (July 1, 1981), slip op. 7 n.5—respondent's contention is unavailing.[3]

3. The ACLU suggests (Br. 6 & n.3, 47 n.39) that our failure to challenge the court of appeals' suppression of the contents of respondent's leather pouch reveals some defect

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[2]See, *e.g.*, *Colorado* v. *Bannister*, 449 U.S. 1 (1980); *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 760; *United States* v. *Chadwick*, 433 U.S. 1, 12-13 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976); *Texas* v. *White*, 423 U.S. 67 (1975); *Cardwell* v. *Lewis*, 417 U.S. 583, 589 (1974); *Cady* v. *Dombrowski*, 413 U.S. 433, 439-440 (1973); *Cooper* v. *California*, 386 U.S. 58 (1967).

[3]We do not understand respondent's assertion (Br. 8) that "the present case involves a warrantless seizure of an automobile for the sole purpose of transporting it to the station house for the warrantless seizure of a paper bag" or the conclusion drawn (*ibid.*) that "the automobile exception * * * cannot apply" to such an automobile. It is undisputed that respondent's paper bag was discovered in the course of a lawful on-the-spot search of his automobile, and that the bag, too, was searched on the spot, at which time the heroin contained within was discovered (H. Tr. 66-67). The officers then replaced the bag and its contents in respondent's trunk, transported the vehicle to a police station, and there removed the heroin from the bag and completed a search of the car (*ibid.*). These facts in no way undercut the validity of the initial search of the bag or sever the connection between that search and the search of respondent's car.

or inconsistency in our analysis. That suggestion is unfounded. The reason we did not challenge the ruling below regarding the pouch was that upon rehearing in the court of appeals the government conceded that suppression of the pouch was proper (Pet. App. 15a). We accordingly deemed it inappropriate to challenge that aspect of the decision below in our petition. See *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). It is perfectly true, however, that adoption of our automobile search analysis would in all likelihood validate the search of containers such as respondent's pouch.[4] Contrary to the ACLU's contention (Br. 27, 47 n.39), however, that result is not irreconcilable with *Sanders* and *Chadwick*, for those cases did not involve searches of a container occurring in the course of an automobile search based upon probable cause extending to the automobile itself. See *Robbins* v. *California*, No. 80-148 (July 1, 1981), slip op. 7 (Powell, J. concurring); *id.* at 1-2 (Blackmun, J., dissenting); *id.* at 3-7 (Rehnquist, J., dissenting); *id.* at 1-3, 5-6 (Stevens, J., dissenting); *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 767-768 (Burger, C.J., concurring in the judgment); *id.* at 772 (Blackmun, J., dissenting).[5]

4. Because mail is often wrapped in a paper container—an envelope—respondent suggests (Br. 27-28) that our argument respecting low privacy containers is irreconcilable with the rule of *Ex parte Jackson*, 96 U.S. 727, 733

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[4]Should this Court reverse on an analysis suggesting that the pouch was properly admitted in evidence, the court of appeals would then be free to decide on remand whether to reconsider its holding with respect to the pouch.

[5]Contrary to the ACLU's assumption (Br. 18), the relationship between respondent's automobile trunk and his heroin was far from casual or temporary. The officers who stopped respondent had reliable information that respondent was selling narcotics from the automobile trunk (H. Tr. 4). Their suspicion did not focus on the paper bag until it was discovered in searching the trunk.

(1878), that mail is generally cloaked with the protection of a warrant requirement. Respondent misconceives our argument. We do not question the decision in *Ex parte Jackson*, and we have no doubt that features of a package or container other than physical durability may provide the objective indicia that the container is vested with privacy attributes of such a magnitude that a warrant is needed to protect against the costs of an unreasonable search. The special function of mail as an organ of communication as well as commerce, together with the laws which protect the sanctity of the mails, establish the legitimacy and socially recognized substantiality of the expectation of privacy for mail. See *Walter* v. *United States*, 447 U.S. 649, 655 (1980) (opinion of Stevens, J.); 18 U.S.C. 1700-1710. Respondent's unsealed lunch bag, however, had no attributes, structural or otherwise, that could support a substantial expectation of continued privacy after it came lawfully into the hands of police officers.

5. The ACLU suggests (Br. 58) that the analysis we employ to distinguish containers that may reasonably be searched without a warrant from more private containers such as luggage "requires inquiry into the accused's subjective intent." This suggestion reflects a serious misunderstanding of our submission. Consistent with *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), the focus of our analysis is upon the reasonableness and socially recognized substantiality of an expectation of privacy, rather than upon its mere existence. Toward that end it is appropriate to consider not only the physical properties of the container chosen by an individual, but any other conduct or circumstance that *objectively* manifests the owner's expectation of privacy.

Rather than the government, it is the amicus curiae that focuses improperly (Br. 49, 60) upon the subjective privacy expectations of an individual, branding as unreasonable any warrantless search unless the owner "knowingly

exposes [his property] to the public." The suggested exception is too narrow. Indeed, it is no exception at all, for when items are exposed to public view, their examination simply does not entail any "search" within the purview of the Fourth Amendment. The ACLU's formulation thus would effectively eliminate all consideration of the reasonableness of a claim of privacy from the Fourth Amendment calculus. In fact, by choosing a container not calculated to maintain privacy after it has left his hands, an individual objectively manifests the absence of reasonable expectation of substantial privacy. Because any purely private expectation to the contrary is necessarily unknown to the police, it should not receive any consideration in determining the reasonableness of a search under the Fourth Amendment.

6. Respondent (Br. 28) and the ACLU (Br. 56) both assert that insurmountable problems of administration will arise unless the warrant requirement is extended to all containers, of whatever description, without regard to the presence or absence of any legitimate expectation of substantial privacy maintained therein. This prediction is substantially undercut, however, by the striking uniformity with which the courts of appeals have distinguished between luggage and its functional equivalents on the one hand and paper and plastic bags on the other (see cases cited in our opening brief at 31-32 & nn.17-18).[6] And neither respondent nor amicus makes any effort to delimit the scope of the

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[6]Contrary to respondent's assertion (Br. 31-32), the courts of appeals' decisions we have cited (Br. 31-33 & n.18) generally rest upon consideration of the individual's expectation of privacy rather than a search-incident-to-arrest rationale or true exigent circumstances. It may well be that after *New York* v. *Belton*, *supra*, the result in some of these cases could be justified on an alternative ground. That possibility, however, has no bearing upon the relevant point: the ability of the courts of appeals to achieve a high degree of consistency in cases presenting the question whether a warrant is required. And in the aftermath of *Belton*, the courts of appeals continue to draw the distinction we have noted. See, *e.g.*, *United States* v. *Marin*, Nos. 81-1300 &

sweeping doctrine enunciated by the court of appeals, by explaining how "containers" would be defined for the purpose of that rule. Thus, rather than eliminate the problem of determining when a warrant is required, the decision below merely shifts the locus of uncertainty.[7] In sum, it may be that a degree of uncertainty would attend any rule governing the circumstances in which warrants are required, but there is little practical difference in this regard between the rule for which we contend and that adopted by the court of appeals; practical considerations accordingly cannot justify abandoning an analysis that turns upon the pertinent Fourth Amendment policies.

CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1982

81-1301 (2d Cir. Jan. 18, 1982), slip op. 853-854; *United States* v. *Weber*, Nos. 80-1533 *et al.* (1st Cir. Dec. 28, 1981), slip op. 5-6 (on petition for rehearing; see note 7, *infra*).

[7]As noted in our opening brief (at 39), in *United States* v. *Weber*, 664 F. 2d 841 (1981), the First Circuit held that a warrant was required to unroll a rolled up raincoat seized by law enforcement authorities. Upon consideration of the government's petition for rehearing, the court adhered to the view that *Robbins* v. *California* requires that result, but concluded that the law of the First Circuit had been to the contrary prior to *Robbins*, and accordingly declined to give retroactive effect to its interpretation of *Robbins*. *United States* v. *Weber*, Nos. 80-1533, *et al.* (Dec. 28, 1981).